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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. RICHARD ROBERT MATURINO, Defendant and Appellant.	E047382 (Super.Ct.No. FSB040793) OPINION

APPEAL from the Superior Court of San Bernardino County. Bryan F. Foster, Judge. Affirmed.

Marcia R. Clark, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Rhonda Cartwright-Ladendorf and Kristen Kinnaird Chenelia, Deputy Attorneys General, for Plaintiff and Respondent.

During the guilt phase of the trial, the jury found defendant, Richard Maturino, guilty of first degree murder (Pen. Code, § 187, subd. (a)),[1] during which he used a knife (§ 12022, subd. (b)(1)). During the sanity phase of the trial, the jury determined that defendant was sane at the time he committed the murder. He was sentenced to prison for 25 years to life, plus one year. He appeals, claiming the trial court erred in excusing a juror during sanity phase deliberations, therefore the jury's finding in that regard should be reversed. We reject his contention and affirm.

FACTS

Defendant stabbed his wife in the neck as she lay sleeping in the bed next to him. When she awoke in response to the attack, he held her down and stabbed her three more times in the neck, killing her.

ISSUE

The trial of the sanity phase took one day. The jury deliberated for 15 minutes that day and after one hour of deliberations the next day, sent the judge the following note: "We . . . can not come to a[n] unanimous decision[.] How do we proceed?" In the presence of the jurors, the foreperson reported that the jury was split 11 to 1, which he/she termed "cemented" and there had been no movement in the slightly longer than an hour the jury had been deliberating. The foreperson said that he/she did not believe that there would be any assistance the trial court could give in terms of additional instructions

[1] All further statutory references are to the Penal Code unless otherwise indicated.

or clarification or anything else that might help the jury in reaching a decision. The trial court pointed out that the jury had only been deliberating a little over an hour and it ordered the jury to resume deliberations, saying, " . . . I don't mean by sending you back . . . I'm indicating I think you should change your decision in any fashion. . . . I think you should . . . continue to deliberate and see if you can reach a decision on it. If you continue to believe you're not going to be able to make any further progress on it after you give it a little more of a go, we'll reconsider whether or not we should hang the jury up . . . ."[2] After suggesting that the jury take its lunch break then, adding that "sometimes some cooling off period may be of assistance[,]" the court added, "It's up to you what you want to do, but I'd ask for you to continue your deliberations after lunch."

The jurors went to lunch seven minutes later. After lunch, they deliberated another 30 minutes before asking to see the recording of defendant's interview with a detective. Five minutes later, they requested "the dialogue to the interview with [the d]etective." The minutes state that court was adjourned one hour and 45 minutes later. During that time, according to the trial court speaking the next day, the jurors were given the compact disc of defendant's "taped confession" and they supposedly replayed it,[3]

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[2] The trial court also said, after pointing out that the jury had been deliberating only a little over an hour, "[T]he issue is a relatively straightforward issue, there's not complexity in it; although, there may be some complexity in your analysis of it." Defendant somewhat unfairly categorizes this as the trial court "telling the jury the issue was a simple one."

[3] During discussions on the dismissal of the juror, the trial court said it did not know if the jury replayed the confession.

then continued to deliberate for another "half hour or so." They decided not to return the following day, which was a Friday, but to return on Monday.[4] After adjournment, a juror told the bailiff that she was under psychological treatment, the pressure of the trial was too much for her, she was beginning to have what she considered to be a mental breakdown and she could not return. She requested to be discharged. The prosecutor reported that while the jurors had been on break earlier that day, she had observed this juror[5] in the parking lot and confirmed that she appeared to be having a mental breakdown. The prosecutor said she had seen this juror having words with others and "storming off" through the parking lot and up the street. The trial court talked to the juror, who reported that she had anxiety issues, for which she took medication. She said that her anxiety was not an issue in her professional life, but she became very anxious when the judge sent the jury back into deliberations, "when [she] was the one not willing to make a decision." She said she felt pressure and that made her anxiety problem more prominent. She said she felt her condition was affecting her because she could not be

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[4] The trial court later said that this was due to the fact that one of the jurors had an appointment on Friday.

[5] Defendant asserts, "It is unclear whether the juror described by the prosecutor was the one who asked to be removed from the jury." However, the trial court told the parties that it assumed that the juror who asked to be excused was the same juror who, during voir dire, said she had been diagnosed with a mental disability. The prosecutor stated that this was juror number nine, who was the juror she saw in the parking lot. It is crystal clear that the trial court then ordered this same juror to come in and speak to it. Later comments by the court reinforce this. (E.g., in speaking about the excused juror, the trial court said, "[S]he indicated . . . she had an anxiety disorder which I believe was disclosed during the jury selection process . . . .")

strong enough to continue in her position. She said that the pressure was causing anxiety, which she wanted to end, so she would vote against her conscience to accomplish this. She said she did not believe the decision she made was wrong, but she felt that if she continued in deliberations, she would concede. During her statements, she was "tearful and using Kleenex." The trial court excused her, saying, "I can tell from your own physical demeanor here it's become too much of a strain for you[.]" The juror thanked the court for excusing her. Thirty eight minutes after beginning deliberations, the newly constituted jury returned a finding that defendant was sane at the time of the murder.

The trial court made the following observation about the excused juror: "[H]er decision appears to be one that has to do with—I don't know if bullying is the right term. Her emotional state is such that the discussions with the other jurors have put so much pressure on her she feels she cannot maintain her oath as a juror to a vote of conscience in this matter. [¶] . . . [¶] . . . It's obvious this juror cannot continue regardless of how the case proceeds one way or the other." The prosecutor observed, "I think she also seemed to indicate physically the anxiety, her diagnosis . . . has now become prevalent and prominent." Defense counsel said, "[T]he juror should not have been dismissed. She was indicating she could not feel further deliberations would help her. Her mind was made up, and the other jurors were continuing to pressure her which was cause for her to have undue anxiety. She was fearful she would change her mind which was made up just to get out of the jury, but I think the appropriate call would be to inquire further if deliberations would be helpful, if not[, a] mistrial should be declared . . . ."

During discussion of the propriety of the excusal of the juror, the trial court said, "[A]fter listening to the juror my concern was twofold: No. 1, was that the juror was in tears while we were talking. She felt that she could no longer continue to deliberate in good conscience because of the fact—and she did indicate that she was the holdout, and she felt that because of the pressure that was being placed on her that it was too much for her emotionally and if I did tell them to continue to deliberate that she indicated that she would have to go back in and change her mind and vote with the majority, not because of her conviction that [that was the] . . . correct verdict[,] but[,] rather she couldn't take the pressure anymore. [¶] . . . [S]he indicated she was under psychiatric care and that she had an anxiety disorder . . . but because of that condition . . . she felt she was not mentally capable to continue deliberations or to give an objective view of the evidence any further. Based upon that[,] I excused her because of the fact that I felt that she had a disability . . . it would be unfair, given her mental state . . . , for her to continue . . . and . . . it's . . . her indication . . . that she was no longer willing to vote her conscience but rather was willing to do a majority vote which would have been in direct violation with the directions of the Court. . . . [I]t is a failure of the juror to deliberate is how I interpreted that and that was the reason that she was excused."

The jurors had been instructed not to change their minds just because other jurors disagreed with them.

Defendant begins his attack on the trial court's excusal of the juror by mischaracterizing the record—he asserts that the jury, during the sanity phase, considered

only evidence it had already considered during the guilt phase, a matter he repeats throughout his brief. This is incorrect.

During the guilt phase, the defense psychiatrist testified that at the time of the murder, defendant suffered from mild mental retardation and was under the influence of a large dose of methamphetamine.[6] During the sanity phase, she opined that defendant was legally insane at the time of the murder—that he did not understand the nature of his act and /or that he did not know and understand that his act was morally and legally wrong, because of his retardation and methamphetamine use, and she explained how she reached this conclusion.

The prosecution's psychologist, during rebuttal at the guilt phase, opined that defendant had no diagnosed mental illness and was not retarded. He criticized the opinion of the defense psychiatrist and he suggested that defendant was exaggerating or feigning symptoms of a mental illness. At the sanity phase, he conceded that while defendant had some cognitive limitations, he was not mentally retarded and nothing suggested that he was insane at the time of the murder. Specifically, he opined that defendant knew right from wrong, and he explained the basis for his opinion. He concluded that defendant was not in a methamphetamine-induced psychotic state at the

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[6] Based on this, defense counsel argued to the jury that defendant's methamphetamine intoxication and/or his retardation created a reasonable doubt that he had the requisite intent to kill and/or that he deliberated and premeditated, therefore, he should either be acquitted altogether or convicted only of involuntary manslaughter (if either circumstance prevented him from having the intent to kill) or he should be convicted of second degree murder (if either prevented him from deliberating or premeditating).

time of the murder and he explained the basis for this opinion. He also opined that defendant's post arrest statement was inconsistent with him being retarded. He criticized the manner in which the defense psychiatrist came to the conclusion that defendant was insane.

The prosecution's forensic psychologist, during rebuttal at the guilt phase, agreed with the prosecution's psychologist that, while defendant had cognitive deficits, there was no evidence of mental retardation, nor did defendant have a mental illness or disorder. During the sanity phase, he opined that while defendant was under the influence of methamphetamine at the time of the murder and had cognitive defects, which may have prevented him from deliberating and premeditating, he did not have a mental defect, he knew the quality and nature of his act (i.e., that he was stabbing his wife in the throat) and the difference between right and wrong, and he explained why he so concluded.

Therefore, contrary to defendant's assertion, the jury, during the sanity phase, "had [not] already considered the evidence during . . . [their guilt phase] deliberations[.]"[7] Defendant's assertion that "th[e] jury [during the sanity phase] had very little left to discuss by the time [it] had concluded"[,] grossly understates the

[7] Defendant's alternate interpretation of his faulty premise, that since the juror in question had successfully deliberated with other jurors during the guilt phase, she must have been able to deliberate successfully with them during the sanity phase, is as faulty as its premise.

significant task ahead of the jury of determining a question left unaddressed during the guilt phase, i.e., whether defendant was sane at the time he committed the murder.

Defendant continues, "The trial court's remarks to the jury were coercive and the improper order for further deliberations served only to create the impression that the holdout juror would be subjected to further pressure for an indefinite period of time after she had already fairly deliberated and reached a decision." In so doing, defendant takes the facts that were made known to the court after it directed the jury to continue to deliberate, makes assumptions based on those facts, and uses those assumptions to criticize the court's decision to have the jury return for further deliberations. This he cannot do. (See *People v. Leonard* (2007) 40 Cal.4th 1370, 1393.) What the court knew at the time it asked the jury to return for further deliberations was simple—that the jury had deliberated for a mere one hour and 15 minutes over this difficult and complicated question whether defendant was sane at the time he committed the murder, that the jury was split 11 to 1, that none of the jurors had moved from their initial positions in that hour and 15 minutes and that, in the opinion of the foreperson, the split was "cemented" and he/she did not believe that further instructions or deliberation would be of assistance. Contrary to defendant's assertion, there is nothing inherently coercive in the language used by the court in directing the jury to continue to deliberate and there was nothing in the circumstances *known to the court at the time* to indicate that its directive was heavy-handed or otherwise improper.

Defendant's attempt to weave the trial court's direction that the jury continue to deliberate into his argument that this juror should not have been excused is meritless. Contrary to defendant's assertion, the trial court's remarks did not "effectively t[ell] th[is] holdout juror that she would be required to endure the pressure [from other jurors] indefinitely."

Of course, all of defendant's criticism of the trial court's action upon learning that the jury was deadlocked is not the main issue he asserts requires reversal of the jury's finding that he was sane at the time he committed the murder. He acknowledges that the trial court's decision to excuse a juror and continue with an alternate rests within its sound discretion. (*People v. Cleveland* (2001) 25 Cal.4th 466, 474.) We add, "If there is any substantial evidence supporting the trial court's ruling, we will uphold it." (*People v. Marshall* (1996) 13 Cal.4th 799, 843.) However, a juror's inability to perform as a juror must appear in the record as a demonstrable reality. (*Ibid*.)[8]

In *People v. Warren* (1986) 176 Cal.App.3d 324 (*Warren*), after the case had been submitted to the jury, a juror told the trial court "that she had been 'intimidated' by the other jurors, that she was in disagreement with them, that she felt she was going to 'break under it,' that 'I feel so intimidated now that I think I would vote the way the group wants to vote even though I firmly believe I shouldn't,' and that 'at this stage I'm afraid that I

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[8] Defendant asserts that this is even more the case here, because "the discharge of a juror who is holding out in a defendant's favor implicates a defendant's federal and state constitutional rights to a unanimous jury decision." However, neither the foreperson nor the juror in question reported to the trial court whether the latter was "holding out *in defendant's favor*." Only speculation supports that she was.

will give in and maybe I won't.' (*Id*. at p. 326.) She said she could not follow the court's instruction that she should not be influenced to decide any question in a particular way because a majority of the jurors or any of them favor such a decision. (*Ibid*.) The appellate court found no abuse of discretion in the excusal of this juror. (*Id*. at p. 327.)

There is no substantial difference between the facts here and those in *Warren*. The juror here twice asserted that she did not believe she could vote her conscience. Although defendant asserts that this is "not a fair appraisal of the situation"—it is. This juror *asked* to be excused and she thanked the court when it complied with her request.

The fact that this juror was able to perform her duties and come to a decision during the guilt phase, contrary to defendant's assertion, does not mean she could do the same during the sanity phase. The issues were entirely different, and there was apparently no pressure placed on her during the former in order to reach a verdict. The fact that no one reported that this juror refused to deliberate or discuss her views, as defendant points out, is also irrelevant to the trial court's determination that she was unable to follow the instruction to vote her conscience.

To the extent defendant here appears to suggest that when the juror asked to be excused, the trial court should have refused her request and just declared the jury hung, he is incorrect. The juror had taken her position before the foreperson first reported to the trial court that the jury was hung—thereafter, the jury went to lunch, during which the juror in question had her "breakdown" in the parking lot. (Lunch was the only break the jurors took that day.) After lunch, the jury requested and purportedly reviewed the

defendant's recorded statement to the detective and a transcript of it. There was no report by the jury that it was hung or that further deliberations or instructions would not be helpful at any point during the rest of the day. Under the circumstances, the juror's report that by the end of the day she felt pressured by the others and her twice made assertion that she would vote against her conscience under such pressure should not have triggered a declaration by the trial court that the jury was hopelessly deadlocked. By that time, the damage to her had been done by her fellow jurors[9]—she wanted out and she was grateful for the relief of being excused. Thus, there would have been no point to the trial court indicating to her how much longer it would have the jury deliberate before declaring a mistrial, as defendant now suggests the court should have done.

Having already concluded that the trial court's remarks upon asking the jury to continue to deliberate were not coercive, we necessarily reject defendant's assertion that these remarks, combined with the excusal of the juror in question, created a coercive atmosphere, justifying reversal of the sanity finding.

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9 In denying defendant's motion for a mistrial, the trial court said of the juror in question, "This is a situation where the juror comes in and explains to the [c]ourt that they are in such an emotional turmoil that they will violate the [c]ourt's directions and will go along with the majority in order to be relieved from the mental stress. [¶] You add to that the fact that she was under psychiatric treatment and expressed significant emotional distress during the proceedings in chambers over this matter; that based upon all of that I find that she was unable to continue for two reasons… because of her own mental health issues and . . . [she] indicat[ed] . . . the willingness to violate the orders of the [c]ourt."

DISPOSITION

The judgment is affirmed.

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RAMIREZ
P.J.

We concur:

HOLLENHORST
J.

McKINSTER
J.